Supreme Court, U.S.
FILED

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No.

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IN THE

# Supreme Court of the United States

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ELIZABETH FEASTER,

*Petitioner,*

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

*Respondent,*

---

On Petition For Writ Of Certiorari To The
District Court of Appeal, First District, State of Florida

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## PETITION FOR WRIT OF CERTIORARI

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27 pp

## QUESTIONS PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. §12131-12165, against the Florida Board of Nursing for discrimination against an applicant for a nursing license based upon the applicant's mental impairment.

## PARTIES TO THE PROCEEDING

Petitioner is Elizabeth Feaster (Fe aster").

Respondent is State of Florida, Department of Health, Board of Nursing ("FBN").

This is a proceeding in which the constitutionality of Title II of the Americans with Disabilities Act, 42 U.S.C. §12131-12165, is called into question and 28 U.S.C. §2403(a) may apply. In accordance with Rule 29.4(b), petitioner will serve a copy of this petition on the Solicitor General of the United States.

## CORPORATE DISCLOSURE STATEMENT

Feaster is an individual. Therefore, there are no parent corporations or subsidiaries.

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Feaster respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida in this case.

## OPINIONS AND ORDERS BELOW

The District Court of Appeal, First District, State of Florida opinion (App. A) is reported at 846 So.2d 1238 (Fla. 1st DCA 2003). The order (App. B) entered by L. Haldane Taylor, Circuit Judge of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, is non-published.

## STATEMENT OF JURISDICTION

This district court of appeal entered its opinion on June 9, 2003. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the United States Constitution and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-12165.

The Eleventh Amendment states in pertinent part as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment states in pertinent part as follows:

> SECTION 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title II of the Americans with Disabilities Act of 1990 states in pertinent part as follows:

"The term 'public entity' means-
(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State... 42 U.S.C. § 12131.

* * *

"...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

## STATEMENT OF THE CASE

In January 1999, Elizabeth Feaster ("Feaster") started the Registered Nurse degree program at Daytona Beach Community College ("DBCC"). In accordance with the Americans with Disabilities Act of 1990 ("ADA"), DBC provided Feaster with special accommodations through their Student Disability Services. She required special accommodations due to the fact she suffered a closed head injury in 1998, which resulted in mental impairment of loss of ability to perform tasks that measure attention such as examinations. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors. (App. ).

Following Feaster's graduation from the DBCC Nursing Program, she applied to the Florida Board of Nursing ("FBN") for nursing licensure. She first took the licensure examination at the Sylvan Learning Center in Jacksonville. While she expected to take the licensure

examination in a quiet room with few people taking the exam, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam. (App. ).

Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination. FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination. Instead, FBN's response to Feaster's request was to sua sponte reconsider her application for licensure and determined that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety. (App. ).

The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners." The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession. Consequently, FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession. (App. ).

Feaster filed a complaint in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida in which she alleged that the failure of the FBN to provide her with reasonable accommodation during her nursing licensure exam on the basis of her disability violated Title II of the ADA, 42 U.S.C. § 12131, *et seq.*

The complaint named FBN as defendant, and sought both damages and injunctive relief.[1] (App. ).

The circuit court dismissed Feaster's complaint with prejudice. (App. ). The circuit court held that under *Board of Trustees of the Univ. of Alabama v. Garret,* 531 U.S. 356 (2001) and *Association for Disabled Americans, Inc. v. Florida International University,* 178 F. Supp. 2d 1291 (S.D. Fla. 2001), the Eleventh Amendment bars suits under Title II of the ADA. (App.).

Feaster filed a timely notice of appeal to the District Court of Appeal, First District, State of Florida. The District Court of Appeal affirmed the Circuit Court's dismissal of Feaster's case in a per curiam opinion on June 9, 2003. The opinion cited *Ass'n of Disabled Ams., Inc. v. Fla. Int'l Univ.*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001), and *Dept of Highway Safety & Motor Vehicles v. Rendon,* 832 So. 2d 141 (Fla. 3d DCA 2002) as its authority.[2]

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[1] The dismissal of the request for injunctive relief is not at issue in this proceeding.

[2] The District Court of Appeal was the state court of last resort for Feaster in this case because a per curiam affirmed opinion is not appealable to the Florida Supreme Court. See *Persuad v. State,* 838 So.2d 529 (Fla. 2003).

## REASONS FOR GRANTING THE WRIT

### I.

### THE FLORIDA DISTRICT COURT OF APPEAL OPINION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT AND IS THE SAME QUESTION FOR WHICH CERTIORARI HAS BEEN GRANTED AND REVIEW PENDING IN LANE V. TENNESSEE.

The question presented in this case is whether the Eleventh Amendment bars suit under Title II of the ADA. In *Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001) this Court settled the question as to Title I of the ADA, but expressly declined to decide the question as to Title II.

Subsequent to Garrett, the United States Courts of Appeal and underlying District Courts and State Courts have become widely split on this question in regard to Title II. In light of the conflict, this Court granted certiorari to review the question as to Title II in *Medical Board of California v. Hason,* 279 F.3d 1167 (9th Cir. 2003, *petition for writ of certiorari granted* 123 S.Ct. 561 (November 18, 2002). However, the Medical Board of California subsequently moved to dismiss the petition which this Court granted. *Id. petition for writ of certiorari dismissed* 123 S.Ct. 1779 (April 7, 2003).

This Court has again granted certiorari to review this question in *Lane v. Tennessee,* 315 F.3d 680 (6th Cir. 2003, *petition for writ of certiorari granted* 123 S.Ct. 2622 (June 23, 2003). *Lane* is currently pending review of this Court

In *Lane*, The Sixth Circuit followed its prior decision in *Popovich v. Cuyahoga County Court of Commons Pleas,* 276 F.3d 808 (6th Cir. 2001) holding that the Eleventh Amendment barred Title II claims based upon equal protection violations, but did not bar such claims for violations of due process.

## II.

## THE UNITED STATES COURTS OF APPEAL AND UNDERLYING DISTRICT COURTS AND STATE COURTS ARE WIDELY SPLIT ON THE QUESTION PRESENTED.

The United States Courts of Appeal and underlying Federal District Courts and State Courts are widely split on the application of the Eleventh Amendment to Title II of the ADA. As stated above, the Sixth Circuit held in *Lane* and *Popovich* that the Eleventh Amendment bars Title II claims based upon equal protection violations, but does not bar such claims for violations of due process.

The First and Second Circuits have differing standards for limiting the scope of states' Eleventh Amendment immunity from Title II actions. In *Kiman v. New Hampshire Dept. of Corrections,* 301 F.3d 13 (1st Cir. 2002), the court held Title II actions are permitted against the states in cases in which the court identifies a constitutional violation by the state. In *Garcia v. S.U.N.Y Health Sciences Center,* 280 F.3d 98 (2nd Cir. 2001), the court held that Title II actions may only be brought against states if the plaintiff can establish the violation was motivated by discriminatory animus or ill will based upon the plaintiff's disability.

The Fourth, Fifth and Tenth Circuits hold that the Eleventh Amendment bars all Title II claims against the states. *See Brown v. North Carolina Division of Motor Vehicles,* 166 F.3d 698 (4th Cir. 1999); *Reickenbacker v. Foster,* 274 F.3d 974 (5th Cir. 2001); *Thompson v. Colorado,* 278 F.3d 1020 (10th Cir. 2001).

In stark contrast to the above opinions is the Ninth Circuit's decision in *Hason v. Medical Board of California,* 279 F.3d 1167 (9th Cir. 2002), which held that Congress completely abrogated the states' Eleventh Amendment immunity in enacting the ADA. Therefore, Title II claims are permitted against the states for any alleged violation.

## III.

## THE FLORIDA DISTRICT COURT OF APPEAL OPINION CONFLICTS WITH UNITED STATES COURT OF APPEALS DECISIONS ON THE SAME IMPORTANT QUESTION OF FEDERAL LAW.

The Florida District Court of Appeal decision in this case follows the standard applied in Fourth, Fifth and Tenth Circuits, that the Eleventh Amendment bars all Title II claims against the states. Accordingly, the decision conflicts with the above-referenced decisions of the First, Second, Sixth and Ninth Circuits.

## Conclusion

For the above reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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# APPENDIX

## APPENDIX A

846 So.2d 1238

District Court of Appeal of Florida,
First District.

Elizabeth FEASTER, Appellant,
v.
STATE of Florida, DEPARTMENT OF HEALTH, BOARD OF NURSING, Appellee.

No. 1D02-1631.

June 9, 2003.

An appeal from the Circuit Court for Duval County, L. Haldane Taylor, Judge.

James N. Charles, Celebration, for Appellant.

Charlie Crist, Attorney General, Charlie McCoy and Joseph B. Donnelly, Assistant Attorneys General; Thomas E. Warner, Solicitor General, and Louis F. Hubener, III, Deputy Solicitor General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 178 F.Supp.2d 1291 (S.D.Fla.2001); *Dep't of Highway Safety & Motor Vehicles v. Rendon*, 832 So.2d 141 (Fla. 3d DCA 2002).

ERVIN, KAHN and PADOVANO, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 01-7361-CA
DIVISION: CV-B

ELIZABETH FEASTER,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD QF NURSING,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

This matter is before the Court on the Complaint filed by Elizabeth Feaster (applicant), on November 1, 2001, and the Motion to Dismiss filed by the State of Florida, Department of Health, Board of Nursing (nursing board), filed on December 6, 2001. The Court held a hearing on the Motion on February 12,2001. Both parties were represented by counsel. The Court, having heard arguments of counsel, having fully considered the record, including the pleadings and memoranda filed by counsel, and otherwise being fully advised, makes the following findings of fact and conclusions of law.

**Findings of Fact**

1. The Complaint alleges money damages for violations of 42. U.S.C. § 1213 1-32, the Americans with Disabilities Act of 1990 (ADA).

2. The applicant alleges that she suffered a closed head injury in 1998 that resulted in a "mental impairment." (Compl. ¶ 6.)

3. The applicant further alleges that she failed her licensing examination because the nursing board provided a special testing site with a dozen other test-takers, instead of a "quiet room with few people." (Compl. ¶ 12-14.)

4. The applicant's second request for a special setting for her examination resulted in a request that she appear before the nursing board to undergo an independent evaluation to determine "whether she is able to practice as a registered nurse with reasonable skill and safety." (Compl. ¶ 21.)

**Conclusions of Law**

The United States Supreme Court holds that the Eleventh Amendment bars ADA suits by private citizens against states for money damages. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356(2001); see also Association for Disabled Ams.. Inc. v. Florida Int'l Univ.,. 178 F. Supp. 2d 1291 (S.D. Fla. 2001) (holding that the Eleventh Amendment bars suit under Title II of the ADA). The high court, in so holding, reversed the contrary conclusion of Eleventh Circuit Court of Appeals. See Garrett v. University of Alabama Bd. of Trustees, 261 F.3d 1242 (11th Cir. 2001) (after remand from the United States Supreme Court, holding that action for money damages for state's failure to comply with the ADA are barred by the Eleventh Amendment), reversed in part on other grounds, 276 F.3d 1227 (11th Cir. 2001) (remanding for determination whether the state, by accepting federal financial assistance waived immunity under the Rehabilitation Act). The applicant's reliance upon the lower court Garrett case, and upon a footnote in the supreme court's Garrett case, thus is misplaced in view of

the Garrett language on remand, and the express holding of Association for Disabled Americans.

The high court moreover holds that Congress cannot subject a state to suit in a state court without the state's consent. Alden v. Maine, 527 U.S. 706 (1999). The nursing board's Motion to Dismiss must be granted with prejudice. Garrett; Association for Disabled Ams; Alden.

Therefore, it is

**ORDERED** and **ADJUDGED** that the nursing board's Motion to Dismiss is **GRANTED** with prejudice.

**DONE AND ORDERED** in Chambers at Jacksonville, Duval County, Florida, this _____ day of _____, 2002.

ORDER ENTERED
MAR 14 2002
/S/ L. HALDANE TAYLOR

_____
**CIRCUIT JUDGE**

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**APPENDIX C**

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:
DIVISION:

ELIZABETH FEASTER,
Plaintiff,

v.

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,
BOARD OF NURSING,
Defendant.
_____/

COMPLAINT

Plaintiff, Elizabeth Feaster ("Feaster"), sues defendant, State of Florida, Department of Health, Board of Nursing ("FBN"), and alleges as follows:

1. This is an action for damages in excess of $15,000 and injunctive relief under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131, *et seq.*

2. This court has jurisdiction as the state courts have concurrent jurisdiction with the federal courts of actions under the ADA.

3. FBN is an agency of state government with its headquarters for operations in Jacksonville, Duval County, Florida.

4. FBN is a public entity as defined by 42 U.S.C. § 12131(1).

5. Feaster is a qualified individual with a disability as defined by 42 U.S.C. § 12131(2).

6. Feaster suffered a closed head injury in 1998, which resulted in a mental impairment of loss of ability to perform tasks that measure attention such as examinations.

7. In January 1999, Feaster started the Registered Nurse degree program at Daytona Beach Community College ("DBCC").

8. In accordance with the ADA, DBCC provided Feaster with special accommodations through their Student Disability Services. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test.

9. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors.

10. Following her graduation from the DBCC Nursing Program, Feaster applied to FBN for nursing licensure.

11. Feaster first took the licensure examination at the Sylvan Learning Center in Jacksonville.

12. Feaster expected to take the licensure examination in a quiet room with few people taking the exam.

13. Instead, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers.

14. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam.

15. Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination.

16. Feaster supplied FBN with letters from a neurophsychologist, Dr. Pritchard, and the Chairperson of the DBCC Department of Nursing, Linda Miles.

17. Both Dr. Pritchard and Ms. Miles corroborated Feaster's need for accommodation such as a private room without distractions and a 10 -minute break every hour.

18. Dr. Pritchard stated in her letter that Feaster was "highly motivated."

19. Ms. Miles stated in her letter that Ms. Feaster was an "exemplary student" in the program and would be an "asset to the nursing profession."

20. FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination.

21. FBN response to Feaster's request for reasonable accommodation during the nursing licensure examination was to sua sponte reconsider her application for licensure and determining that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety.

22. FBN has violated the ADA by refusing to grant petitioner's request for reasonable accommodation for the nursing licensure examination.

23. FBN response to Feaster's request for reasonable accommodation for the nursing licensure examination, by sua sponte reconsidering her application for licensure and requiring her to undergo the IPN evaluation and appear before the board and demonstrate her ability to practice with reasonable skill and safety is in violation of the ADA.

24. Feaster can meet, with reasonable accommodation, the essential requirements for receiving the nursing license.

25. FBN has imposed an additional burden upon Feaster in order by requiring her compliance with additional criteria based upon her disability.

26. The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners."

27. The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession.

28. FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession.

29. FBN subjects Feaster to greater inquiry and scrutiny than other applicants.

30. FBN has discriminated against Feaster on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8).

Count I: Injunctive Relief

31. Feaster re-alleges and incorporates herein the allegations in paragraphs 1-30.

32. Feaster has a legal right and interest in being able to apply for nursing licensure and in taking the licensure exam with reasonable accommodation without being subjected to discrimination on the basis of her disability.

33. FBN's continuing discrimination against Feaster on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8), unless and until enjoined by order of this court, will cause irreparable injury to Feaster in that, as a direct and proximate result of FBN's conduct, Feaster is suffering the violation of her rights and is being prevented from entering the nursing profession and subjects her to being stigmatized as an "impaired practitioner" within the nursing profession

34. Feaster is entitle to recovery of her attorney's fees under the ADA and is obligated to pay her attorney a reasonable fee for his services.

WHEREFORE, Feaster demands judgment against FBN for a permanent injunction enjoining FBN from discriminating against her on the basis of her disability.

Count II: Damages

35. Feaster re-alleges and incorporates herein the allegations in paragraphs 1-30.

36. As a direct and proximate result from FBN's discrimination against Feaster on the basis of her disability and its violation of her rights under Title II of the ADA, Feaster has suffered money damages including, but not limited to, loss of earnings in her profession.

37. Feaster is entitle to recovery of her attorney's fees under the ADA and is obligated to pay her attorney a reasonable fee for his services.

WHEREFORE, Feaster demands judgment against FBN for damages, attorney's fees and costs and demands a jury trial for all issues so triable.

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No. 03-534

In The
# Supreme Court of the United States
October Term, 2003

**ELIZABETH FEASTER,**

**Petitioner,**

**v.**

**STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,**

**Respondent.**

**On Petition For A Writ of Certiorari To The District Court of Appeal, First District, State of Florida**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131-12165, against the Florida Board of Nursing for discrimination against an applicant for a nursing license based upon the applicant's mental impairment.

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## STATEMENT OF THE CASE

The petitioner, Elizabeth Feaster, filed a complaint in state circuit court seeking damages and injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq. The defendant was the Florida Department of Health, Board of Nursing ("Board").

Ms. Feaster alleged that in 1998 she suffered a "closed head injury" that resulted in "a mental impairment of loss of ability to perform tasks that measure attention such as examinations." Pet. App. 6. Nevertheless, Ms. Feaster started and completed a nursing program at Daytona Beach Community College, and thereafter took the state nursing licensure examination. Id. The complaint alleged that the "noisy and distracting" environment in which the examination was administered caused her to fail. Id. at 7. She then requested the Board to make "reasonable accommodation" for her impairment. The Board allegedly denied this request. Id.

According to the complaint, the Board then "reconsidered" her application and required that she undergo evaluation by the Intervention Project for Nurses, authorized by § 456.076, Fla. Stat., and appear before the Board to demonstrate her ability to practice nursing with reasonable skill and safety. Feaster alleges that this requirement subjected her to "being stigmatized as an 'impaired practitioner' within the nursing profession." Id. at 8.

Feaster claimed these actions discriminated against her on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8). Id. at 9. In Count I of the complaint Feaster sought a permanent injunction against the Board's discriminatory actions. In Count II she sought damages from the Board in an unspecified amount. Id. at 9-10.

The Board moved to dismiss the complaint on the ground that Title II of the ADA did not properly abrogate the State's sovereign immunity, and that Florida had not otherwise waived

its immunity to an ADA action in its own courts. Relying on Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), and Alden v. Maine, 527 U.S. 706 (1999), the circuit court granted the Board's motion and dismissed the action. Pet. App. 2.

On appeal, Feaster's brief stated that the primary issue was whether the Board was "immune from Feaster's suit for damages under the ADA, Title II." R. App. 8. The argument focused only on the damages claim, not the count for injunctive relief, and amounted to nothing more than the contention that the Florida courts were bound by the decision of the Eleventh Circuit in Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998). The brief stated the single issue presented as follows:

I.

FLORIDA BOARD OF NURSING ("FBN")IS NOT IMMUNE FROM SUIT FOR DAMAGES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

A. This issue was previously decided in *Kimel v. State of Florida Board of Regents.*

B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.

C. Under stare decisis Florida trial courts must follow *Kimel's* holding that ADA abrogated the states' Eleventh Amendment immunity as to Title II.

R. App. 2.

In a per curiam decision the First District Court of Appeal affirmed the dismissal of Feaster's action, citing two recent Title II decisions, Ass'n for Disabled Ams. Inc. v. Fla. Int'l Univ., 178

F. Supp. 2d 1291 (S.D. Fla. 2001), and Dep't of Highway Safety & Motor Vehicles v. Rendon, 832 So. 2d 141 (Fla. 3d DCA 2001).

Feaster's petition for a writ of certiorari acknowledges there is now no issue as to the dismissal of her request for injunctive relief. Pet at. 5 n. 1. It asks the Court to consider whether the Eleventh Amendment bars her state court suit for damages against the Board for alleged discrimination based upon Feaster's mental impairment. Pet. at i.

## REASONS FOR DENYING THE PETITION

### I. NEITHER THE QUESTION PRESENTED NOR THE LIMITED ISSUE ARGUED TO THE FIRST DISTRICT COURT OF APPEAL WARRANTS THIS COURT'S REVIEW.

Petitioner asks this Court to decide whether the Eleventh Amendment bars her state court action for damages. Of course, neither of the lower courts so ruled, and the Board did not argue an Eleventh Amendment bar. The Eleventh Amendment bars a suit against an unconsenting State only in federal court. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984). The Board argued that Congress did not properly abrogate the States' sovereign immunity under its Fourteenth Amendment powers, and that petitioner's action was foreclosed under Alden v. Maine, 527 U.S. 706 (1999), because Florida had not waived its immunity to an ADA action in its own courts. Relying on Alden, the circuit court held that Florida's immunity barred the claim, and the First District Court of Appeal affirmed.

Even if petitioner means to present the question of whether Congress properly abrogated the States' sovereign immunity for

actions brought under Title II of the ADA, that is not precisely the issue presented and argued to the First District Court of Appeal. In that forum, petitioner simply contended that the Florida courts were bound by an earlier decision of the Eleventh Circuit in Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998), that supposedly ruled on an ADA Title II claim. See R. App. 1-16. That argument was doomed to fail because state courts, absent some claim of res judicata or collateral estoppel, are bound only by decisions of this Court, not the federal courts of appeals. See State v. Dwyer, 332 So. 2d 333 (Fla. 1976); Titus v. State, 696 So. 2d 1257, 1263 (Fla. App. 3d Dist. 1997), approved with opinion, 707 So. 2d 706 (Fla. 1998). See also Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding decisions that rest on their own interpretations of federal law"). Not surprisingly, the First District entered a per curiam affirmance.[1]

The petition thus suffers from two defects. The first is that there is no issue as to whether the Eleventh Amendment bars this state court action. What bars Ms. Feaster's action is Florida's immunity in its own courts. Second, although the question pending before this Court in Tennessee v. Lane, 325 F.3d 680 (6th Cir.), cert. granted, 123 S. Ct. 2622 (2003), is whether

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[1]Feaster's argument to the First District that Kimel ruled on Title II abrogation is insupportable. The Eleventh Circuit's decision in Kimel addressed both the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). See 139 F.2d 1426. The decision eschewed discussion of the facts and did not state whether the ADA claim arose under Title I or Title II. This Court addressed and affirmed only that part of the Eleventh Circuit's decision ruling on the ADEA. See 528 U.S. 62 (2000). In support of her Title II assertion, Feaster cited only the Eleventh's Circuit's reference to 42 U.S.C. § 12202, R. App. 8-9, but that section abrogates the States' immunity under both Title I and Title II. See Garrett, 531 U.S. at 364, citing 42 U.S.C. § 12202.

Congress properly abrogated the States' sovereign immunity pursuant to its powers under § 5 of the Fourteenth Amendment, the argument presented to the First District was simply that Kimel was binding on Florida courts, notwithstanding the decision in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), and the numerous decisions of federal courts of appeals applying Garrett and concluding that Title II did not validly abrogate the States' immunity. That limited argument was clearly wrong and does not merit this Court's review.

Because the Question Presented is neither appropriate for review nor, to the extent it can be restated, preserved for review, this Court should deny the writ. It is not the Court's practice to accept for review a claim that was not properly presented to the state court below:

> With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Campbell v. Louisiana, 523 U.S. 392, 403 (1998) (quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam) (in relevant part refusing to address the issue of petitioner's "fair-cross-section claim" because petitioner failed to show the issue was properly presented to the Louisiana appellate courts); see also Heath v. Alabama, 474 U.S. 82, 87 (1985); Illinois v. Gates, 462 U.S. 213, 218 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

If the Question Presented can be rewritten to conform to that presented in Tennessee v. Lane, and that question is deemed preserved, then the Court may hold the petition until resolution of Tennessee v. Lane. It should be noted, however, that contrary to the representations of the petition, the decision below does not conflict with the decisions of four federal circuits. On the

question of abrogation, it conflicts only with decisions of the Ninth Circuit. See Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002), citing Dare v. California, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001).[2]

Feaster did not allege that the actions of the Board were based on discriminatory animus, or that they violated her right to due process or any other specific constitutional right. Her complaint alleges the Board "discriminated" against her by denying special testing accommodations and proceeding to determine whether she could safely practice nursing despite her mental impairment. Such actions taken in the interest of protecting patients from injurious acts by impaired nurses would not violate the Fourteenth Amendment under the Court's reasoning in Garrett. See Garrett, 531 U.S. at 367 ("States are not required to make special accommodations for the disabled, so long as their actions toward such individuals are rational.").

Ms. Feaster thus alleged only a violation of the ADA, not of any constitutional right. Nor can it be inferred in the absence of

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[2]Decisions contrary to those of the Ninth Circuit are Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Walker v. Snyder, 213 F.3d 344 (7th Circ. 2000), cert. denied, 531 U.S. 1190 (2001); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1979) (en banc), cert. dismissed, 529 U.S. 1001 (2000); Thompson v. Colorado, 258 F.2d 124, amended 278 F.3d 1020 (10th Cir. 2001); cert. denied, 535 U.S. 1077 (2002). The Second Circuit would allow a damages claim under Title II only on proof of discriminatory animus. See Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001). The Sixth Circuit has held that Title II of the ADA cannot be sustained as an act that enforces the Equal Protection Clause, but may be read to enforce the Due Process Clause. See Popovich v. Cuyahaga County Court, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002). The First Circuit has held that a particular constitutional violation must be identified. See Kiman v. New Hampshire Dep't of Corrections, 301 F.3d 13, 30 (1st Cir. 2002).

specific allegations that the Board acted upon some animus towards Ms. Feaster because of her disability. The decision below is therefore consistent with the decisions of at least eight circuits.

Because the abrogation issue has been briefed in Tennessee v. Lane, the Board will not repeat the many reasons that would warrant affirmance of the decision below. These are fully elaborated in the brief submitted by Tennessee.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. In the alternative, should the Court consider the Question Presented to be the same as that presented in Tennessee v. Lane, and that it is properly preserved, the petition should be held pending resolution of that case.

RESPECTFULLY SUBMITTED,

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# APPENDIX

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIRST DISTRICT**

**Case no. 01-07361 CA**

**ELIZABETH FEASTER,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**DEPARTMENT OF HEALTH,**
**BOARD OF NURSING,**
**Appellee.**

_____/

**ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA**

**AMENDED INITIAL BRIEF OF APPELLANT**

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A This issue was previously decided in *Kimel v. State of Florida Board of Regents*.

B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.

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## STATEMENT OF CASE AND FACTS

The appellant, Elizabeth Feaster ("Feaster"), is the plaintiff in a lawsuit against defendant, State of Florida, Department of Health, Board of Nursing ("FBN") for an action for damages and injunctive relief under Title II of the Americans with Disabilities Act of 1990 ("ADA"). (R, p. 1)[1]

In January 1999, Feaster started the Registered Nurse degree program at Daytona Beach Community College ("DBCC"). In accordance with the ADA, DBCC provided Feaster with special accommodations through their Student Disability Services. She required special accommodations due to the fact she suffered a closed head injury in 1998, which resulted in mental impairment of loss of ability to perform tasks that measure attention such as examinations. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors. (R, p. 2)

Following Feaster's graduation from the DBCC Nursing Program, she applied to FBN for nursing licensure. She first took the licensure examination at the Sylvan Learning Center in Jacksonville. While she expected to take the licensure examination in a quiet room with few people taking the exam, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam. (R, p. 2)

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[1] (R, p. __) refers to a given page number in the Record on Appeal in this case.

Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination. She supplied FBN with letters from a neurophsychologist, Dr.Pritchard, and the Chairperson of the DBCC Department of Nursing, Linda Miles. Dr. Pritchard stated in her letter that Feaster was "highly motivated." Ms. Miles stated in her letter that Ms. Feaster was an "exemplary student" in the program and would be an "asset to the nursing profession." (R, p. 3)

FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination. (R, p. 3) Feaster can meet, with reasonable accommodation, the essential requirements for receiving the nursing license. (R, p. 4) FBN's response to Feaster's request was to sua sponte reconsider her application for licensure and determining that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety. (R, p. 3)

The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners." The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession. Consequently, FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession. (R, p. 4)

The Appellee filed a motion to dismiss the complaint. (R, p.10-12). The trial court entered an order granting defendant's motion to dismiss with prejudice. (R, p. 24-26) The trial court entered an order of dismissal with prejudice. (R, p. 32) Feaster filed a timely notice of appeal. (R, p. 27-30).

## SUMMARY OF ARGUMENT

The primary issue in this appeal is whether FBN is immune from Feaster's suit for damages under the ADA, Title II. This issue was previously decided in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *affirmed* 528 U. S. 62 (2000). In *Kimel*, the court held the State of Florida and its subdivisions are not immune from suit for damages under the ADA, Title II because Congress abrogated the sovereign immunity of the states when it enacted the ADA. *Id.* at 1433. The United States Supreme Court has not overruled *Kimel* in cases under Title II of the ADA. In *Board of Trustees of the University ofAlabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA does not abrogate the sovereign immunity of the states. However, the Court expressly declined to apply the rulings to Title II of the ADA.

Kimel remains binding precedent for this trial court and all other state or federal trial court within the jurisdiction of the Eleventh Circuit. In accordance with this precedent, it is error for this trial court and for the U. S. District Court in the Southern District of Florida to speculate as to the effect of *Garrett* as to Title II of the ADA. Therefore, the order granting defendant's motion to dismiss in this case must be reversed.

## ARGUMENT

### I.
### FLORIDA BOARD OF NURSING ("FBN") IS NOT IMMUNE FROM SUIT FOR DAMAGES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

#### A. This issue was previously decided in *Kimel v. State of Florida Board of Regents.*

The primary issue in this appeal is whether FBN is immune from Feaster's suit for damages under the ADA, Title II. This issue was previously decided in *Kimel v. State of Florida Board of Regents*, 139 F. 3d 1426 (11th Cir. 1998), *affirmed* 528 U.S. 62 (2000). In *Kimel*, the court held the State of Florida and its subdivisions are not immune from suit for damages under the ADA, Title II, because Congress abrogated the sovereign immunity of the states when it enacted the ADA. *Id.* at 1433. The standard of review is de novo. *Andrews v. Florida Parole Com'n.*, 768 So.2d 1257, 1260 (Fla. 1st DCA 2000), *rev. dism. As improvidently granted,* 791 So.2d 1093 (Fla. 2001).

Kimel addressed the immunity of the Florida Department of Corrections from suit under Title II of the ADA. The court also addressed the issue of a state's immunity under the Age Discrimination in Employment Act ("ADEA"). The court held the ADEA did not abrogate the state's entitlement to immunity, but the ADA did. *Id.* The court stated as follows:

> In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment..." 42 U.S.C. 12202.

The above-referenced section of the United States Code, 42 U.S.C. 12202 is a provision of Title II. Although the court does not expressly limit its application to Title II, the cited code section clarifies this is a Title II case. *See also Navedo v. Maloney*, 172 Fed. Supp. 2d 276, 288 (Mass. D. 2001) (Stating the 11th Circuit upheld the constitutionality of Title II of the ADA in *Kimel*).

**B. *Board of Trustees of the University of Alabama v. Garrett* does not overrule *Kimel* in Title II cases.**

The United States Supreme Court has not over [sic] *Kimel* in cases under Title II of the ADA. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA does not abrogate the sovereign immunity of the states. However, the Court expressly declined to apply the ruling to Title II of the ADA. *Id.* at footnote 1.

The United States Supreme Court expressly stated in *Garrett* its opinion was not applicable to the issue of immunity under Title II of the ADA. The Supreme Court stated as follows:

> We decide here whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act [full citation of Act omitted].n 1
>
> * * *
>
> n1. . . We are not disposed to decide the constitutional issue whether Title II which has somewhat different remedial provisions from

> Title I, is appropriate legislation under § 5 of the Fourteenth Amendment... To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA... that portion of the writ is dismissed as improvidently granted. (Underline added).

The Court limited the effect of its ruling by expressly stating it was deciding the immunity issue under Title I of the ADA and was not deciding the issue under Title II. The court went even further by dismissing the writ of certiorari ("on the question whether respondents may sue their state employers for damages under Title II of the ADA."

The Supreme Court's express limitation of its ruling and its dismissal of the writ of certiorari as to questions under Title II of the ADA clearly show the error of the trial court in the instant case. The trial court dismissed Feaster's action based upon *Garrett*. Since Feaster's action is under Title II of the ADA, the dismissal should be reversed.

The current state of the law of sovereign immunity under Title II of the ADA after *Garrett* was analyzed in *Navedo v. Maloney, supra*. The court stated as follows:

> Moreover, the Garrett Court was explicit about why it declined to reach Title II: The troubling "lack of findings" in the legislative record with regard to discrimination based on disability by state employers was not mirrored in other areas, such as public services. Id. at 966 & n.7 (concluding that the "overwhelming" majority of accounts of disability-based discrimination in the legislative record :pertain to alleged discrimination by the States in the provision of

> public services and public accommodations, which are addressed in Titles II and III of the A.D.A."). Thus, even as invalidated Title I's abrogation of sovereign immunity, the Supreme Court recognized that Title II rested on a far different base of legislative findings, and declined to include it within the sweep of Garrett's holding. (Underline added.)

The court went on to survey the rulings of the Federal circuit courts of appeal. It noted that the Fifth, Ninth and Eleventh Circuits and numerous district courts in the other circuits have upheld the constitutionality of the derogation of immunity under Title II of the ADA. *Id.* at ____. The court followed the Supreme Court's reasoning in *Garrett* for declining to apply its ruling to Title II and the preponderance of federal case law to decide that Title II of the ADA abrogates the Eleventh Amendment immunity of the states from suit. *Id.* at ____,

*Navedo* demonstrates that *Kimel* continues to provide precedent on the issue of immunity under Title II even after *Garrett*. Although the federal courts across the country are split, the issue is settled within the boundaries of the 11th Circuit Court of Appeals and *Kimel* provides the controlling standard.

**C. Under stare decisis, Florida trial courts must follow *Kimel's* holding that ADA aborogated [sic] the states' Eleventh Amendment immunity as to Title II.**

If the Florida Attorney General in *Kimel* had not stipulated to dismiss the petition for certiorari review in the United States Supreme Court, the Court would have probably directly ruled on the issue of Eleventh Amendment immunity

under Title II. Since it did not, the Eleventh Circuit's holding in *Kimel* is still controlling authority as to Title II of the ADA.

Furthermore, the Eleventh Circuit's holding in *Kimel* is binding precedent for Florida trial courts. State courts are bound by federal court determinations of federal law questions. *See Mobile Oil Corp. v. Shevin*, 354 So. 2d 372 (Fla. 1977); *Ratner v; Arrington*, 111 So. 2d 82 (Fla. 3rd Dist 1959); *Zorick v. Tynes*, 372 So. 2d 133 (Fla. 1st DCA 1979); *Cadieux v. Cadieux*, 75 So. 2d 700 (Fla. 1954). Accordingly, the court in the instant case must follow *Kimel* and deny FNB's motion to dismiss.

The trial court in the instant case also relied upon a case that was improperly decided, *Association for Disabled Americans v. Florida International University*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001). The court ignored *Kimel* and applied *Garrett* to a ADA Title II case. The error in that case should not be repeated in the instant case.

The decisions cited below leave absolutely no doubt that *Kimel* remains binding precedent for this trial court and all other state or federal trial court within the jurisdiction of the Eleventh Circuit. In accordance with this precedent, it is error for this trial court and for the U.S. District Court in the Southern District of Florida to speculate as to the effect of *Garrett* as to Title II of the ADA. Therefore, the order granting defendant's motion to dismiss in this case must be reversed.

The enclosed decisions clearly show the proper application of stare decisis in this case. In each of the decisions cited below, a party made the same argument the Florida Board of Nursing makes in this case-that case precedent of the Eleventh Circuit should be overruled and disregard [sic] in light of subsequent United States Supreme Court decisions that seemed to undermine the validity of the circuit's existing precedent.

In each of the decisions cited below, the Eleventh Circuit resoundingly rejects the arguments for overruling its case precedent. The rulings demonstrate that case precedent of the Eleventh Circuit must be strictly adhered to unless it is expressly overruled by itself sitting en banc or the United States Supreme Court.

In *Engineering Contractors of South Florida, Inc. v. Metropolitan Dade County*, 122 F. 3d 895, 908 (11th Cir. 1997), the court held that it was not at liberty to disregard binding precedent of the Supreme Court that was closely on point to the issue before it even though a subsequent Supreme Court decision supported speculation that the Supreme Court would overrule the precedent unless the Supreme Court expressly overruled its previous opinion. The court stated as follows:

> Even if the VMI case portends a major change in the Supreme Court's approach to gender classifications, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Florida League of Prof'l Lobbyists v. Meggs*, 87 F. 3d 457, 462 (11th Cir. 1996). The Supreme Court has cautioned us that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (Underline added.)

The Eleventh Circuit extends its strict adherence to precedent to its own decisions. Under the court's "prior precedent rule," the panel of justices in *Wascura v. Carver*, 169 F. 3d 683, 687 (11th Cir. 1999), held that it was bound to follow the decision of a prior panel of the court even when it was convinced the prior decision was wrong. The court held as follows:

> Wascura argues that the reasoning of *Welch* [prior 11th Circuit decision] is unclear and inadequate to support its holding. We have no occasion to pass on that criticism, because we are bound by the Welch decision regardless of whether we agree with it. See, e.g., *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998) ("We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision."); *United States v. Steele,* 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."). (Underline added.)

Another example of the prior precedent rule is *Druid Hills Civic Association, Inc. v. The Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985). In that case, one of the parties argued that a Ninth Circuit decision was more consistent with a Supreme Court decision than the precedent of the Eleventh Circuit. The court held that even if this were so, it was required to follow its existing precedent unless it is expressly overruled en banc or by the Supreme Court. The court stated as follows:

> Even were we to agree that *Stop H-3 Association* [9th Circuit decision] offers a view more

> consistent with *Overton Park* [U.S. Supreme Court decision], we would still be bound by our decision in *LES II.* See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). Only this court sitting en banc or the United States Supreme Court can overrule precedent binding on this court.

The above decisions demonstrate the strict adherence to precedent that is required by all courts under *stare decisis*. There is no opportunity for a lower court to depart from precedent unless a higher court expressly overrules the precedent.

The trial courts are not at liberty to disregard the Eleventh Circuit's binding precedent in *Kimel*. Since *Garrett* did not expressly overrule *Kimel*, the trial court must follow *Kimel* in this case.

The application of the above ruling to this case can be further illustrated by noting that under the Eleventh Circuit's prior precedent rule, if this case came before a panel of the Eleventh Circuit, the panel would be bound to follow *Kimel* even if the panel believed *Kimel* was wrong. Since *Kimel* would bind a panel of the Eleventh Circuit in reviewing this case, how can a trial court not be so bound?

This analysis can also be applied to the 11th Circuit's decision that was reversed by the United States Supreme Court in *Garrett, Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F. 2d 1214 (11th Cir. 1999), where the court stated, "We, of course, are bound by the decision of the Court in *Kimel.*" Since the Supreme Court dismissed the writ of certiorari in *Garrett* as to the ADA Title II, the 11th Circuit and other federal and state courts within its jurisdiction continue to be bound by the decision in *Kimel.*

## CONCLUSION

Based upon the authority of the above cases, Elizabeth Feaster respectfully requests this court to reverse the trial court order dismissing her action against the Florida Board of Nursing under Title II of the ADA.

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Attorney

Supreme Court, U.S.
FILED
DEC 23 2003
OFFICE OF THE CLERK

No. 03-534

IN THE

# Supreme Court of the United States

ELIZABETH FEASTER,

*Petitioner,*

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

*Respondent,*

On Petition For Writ Of Certiorari To The
District Court of Appeal, First District, State of Florida

## REPLY TO BRIEF IN OPPOSITION TOTHE PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT MISREPRESENTS THE ARGUMENTS AND RULINGS MADE BELOW IN THE FLORIDA TRIAL AND APPELLATE COURTS

Petitioner, Elizabeth Feaster ("Feaster"), replies to the Brief in Opposition filed by Respondent, State of Florida, Department of Health, Board of Nursing ("FBN") to address misstatements made regarding the arguments and rulings made in the Florida trial and appellate courts.

FBN falsely claims the arguments and decisions in the Florida courts were not based upon the Eleventh Amendment. On page 3 of the Brief in Opposition, FBN states as follows:

> "Petitioner asks this Court to decide whether the Eleventh Amendment bars her state court action for damages. Of course, neither of the lower courts so ruled, and the Board did not argue an Eleventh Amendment bar." (Underline added).

The statement by FBN underlined above is not accurate. The statement is untrue and this is demonstrated by the cases cited in the Florida appellate court opinion in this case, *Feaster v. State of Florida, Department of Health, Board of Nursing*, 846 So.2d 1238 (Fla. 1st DCA June 9, 2003) and the ruling of the Florida trial court included in the Appendix to the Petition for Writ of Certiorari and FBN's motion to dismiss, memorandum of law in support of its motion to dismiss filed in the Florida trial court and FBN's Answer Brief filed in the Florida appellate court, which are included in the Appendix to this Reply Brief.

## THE TRIAL COURT EXPRESSLY RULED THAT THE ELEVENTH AMENDMENT BARS SUIT FOR MONEY DAMAGES UNDER TITLE II OF THE ADA

The ruling of the trial court is provided in full in the Appendix to the Petition for Writ of Certiorari. The trial court expressly ruled that the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act. The relevant excerpt of the ruling was as follows:

> "Conclusions of Law
>
> The United States Supreme Court holds that the **Eleventh Amendment** bars ADA suits by private citizens against states for money damages. ***Board of Trustees of the Univ. of Alabama v. Garrett***, 531 U.S. 356(2001); see also ***Association for Disabled Ams.. Inc. v. Florida Int'l Univ.***,. 178 F. Supp. 2d 1291 (S.D. Fla. 2001) (holding that the **Eleventh Amendment bars suit under Title II of the ADA**). The high court, in so holding, reversed the contrary conclusion of Eleventh Circuit Court of Appeals. *See Garrett v. University of Alabama Bd. of Trustees*, 261 F.3d 1242 (11th Cir. 2001) (after remand from the United States Supreme Court, holding that action for money damages for state's failure to comply with the ADA are barred by the **Eleventh Amendment**), reversed in part on other grounds, 276 F.3d 1227 (11th Cir. 2001) (remanding for determination whether the state, by accepting federal financial assistance waived immunity under the Rehabilitation Act). **The applicant's reliance upon the lower court *Garrett* case**, and upon a footnote in the supreme court's ***Garrett*** case, thus is misplaced in view of the *Garrett* language on remand, and the express holding of ***Association for Disabled Americans***. (Underline and bold emphasis added).

The trial court's ruling agreed with and followed the appellate cases that have interpreted *Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356(2001) to require a finding that the Eleventh Amendment bars suit for damages under Title II of the ADA. The trial court's ruling was based squarely upon the Eleventh Amendment.

## THE FLORIDA DISTRICT COURT OF APPEAL AFFIRMED THE TRIAL COURT'S RULING PER CURIAM CITING ELEVENTH AMENDMENT CASES

FBN likewise misrepresents the Florida Appellate Court ruling. The First District Court of Appeal opinion is provided in the Appendix to the Petition for Writ of Certiorari. It follows the decisions in *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.,* 178 F.Supp.2d 1291 (S.D.Fla.2001); *Dep't of Highway Safety & Motor Vehicles v. Rendon,* 832 So.2d 141 (Fla. 3d DCA 2002). Both decisions are Eleventh Amendment cases.

## FBN ARGUED IN THE FLORIDA APPELLATE COURT BASED UPON THE ELEVENTH AMENDMENT

FBN's Answer Brief filed in the Florida First District Court of Appeal acknowledges the issue on appeal as follows:

> **"WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMUNITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS.**
>
> **A. <u>Title II of the ADA Does Not Properly Abrogate the Eleventh Amendment</u>"**

(Bold emphasis in original).

The entire Answer Brief of FBN is included in the Appendix to this Reply Brief.

## FBN ARGUED FOR DISMISSAL IN THE FLORIDA TRIAL COURT BASED UPON THE ELEVENTH AMENDMENT

FBN's Brief in Opposition also misstates the argument it made to the Florida trial court by claiming that it did not argue an Eleventh Amendment bar. On page 3 of the Brief in Opposition, FBN states as follows:

> "The Board argued that Congress did not properly abrogate the States' sovereign immunity under its Fourteenth Amendment powers, and that petitioner's action was foreclosed under *Alden v. Maine*, 527 U.S. 706 (1999) because Florida had not waived its immunity to an ADA action in its own courts."

FBN's motion to dismiss and memorandum of law filed in the Florida trial court in opposition to Feaster's ADA complaint are provided in full in the Appendix to this Reply Brief. The argument stated above is fallacious. It is not the argument FBN made in the Florida trial and appellate courts.

An excerpt of FBN's memorandum of law demonstrates that its argument was based upon on Eleventh Amendment grounds. FBN states as follows:

> "A. AS A STATE ENTITY, THE BOARD IS IMMUNE FROM SUIT FOR DAMAGES UNDER THE AMERICANS WITH DISABILITIES ACT

The **Eleventh Amendment** to the United States Constitution provides that the federal power can only be wielded against states in limited circumstances.

To be subjected to federal civil rights legislation in federal or state court, the State's **Eleventh Amendment** and sovereign immunity must both be waived. The **Eleventh Amendment immunity** can only be waived by Congress enacting appropriate legislation under Section 5 of the 14th Amendment.

The United States Supreme Court ruled in ***Board of Trustees of the University of Alabama v. Garrett,*** 121 S.Ct. 955, 531 U.S. 356, 148 L.Ed.2d 866 (2001), that Congress did not properly abrogate the states' **Eleventh Amendment immunity** when it enacted Title I of the Americans With Disabilities Act. Title I of the ADA is not appropriate enforcement legislation, the Court ruled, because Congress exceeded its constitutional authority under the 14th Amendment. Garrett, 531 U.S. at 360. Congress exceeded its authority by proscribing certain state action as unlawful discrimination and making the states amenable to private suits for damages without first making record findings that states had historically and irrationally discriminated against the disabled. Id. at 357-58. "

(Underline and bold emphasis added).

FBN's reference to the 14th Amendment above is made in context of the Eleventh Amendment in discussing the *Garrett* decision. For FBN to construe its argument as a 14th Amendment and not an 11th Amendment argument, it would have to likewise construe *Garrett* as a 14th Amendment case and not an 11th Amendment case, which is ludicrous.

FBN also states incorrectly that it raised *Alden v. Maine* as an independent ground from the 11th Amendment. FBN's memorandum of law clearly raises *Alden* in the context of an Eleventh Amendment. The relevant portion of the memorandum states as follows:

> "Moreover, the State of Florida can not be sued under Title I (sic) of the ADA for damages in state court. *Alden v. Maine*, 119 S. Ct. 2240, 527 U.S. 706, 144 L. Ed. 2d (1999). This immunity from suit in state court rests on the state's historic immunity from suit, which is extent until and unless it has been properly abrogated through Congressional action against the **Eleventh Amendment** or properly waived through the State's own waiver of its **Eleventh Amendment immunity** and its sovereign immunity. *Id.* at The State of Florida has not waived its **Eleventh Amendment immunity**, nor has it waived its sovereign immunity from suit under federal claims. See Fla. Stat. § 111.071(4), 768.28 (1), (17). As the United States Supreme Court explained in *Alden v. Maine*, if Congress has not abrogated the state's **Eleventh Amendment immunity** through federal legislation, and the state has not waived its **Eleventh Amendment immunity** or its sovereign immunity as to any

> particular federal claim, then the State can not be sued in any court on that federal claim. (Underline and bold emphasis added).

The above excerpts and FBN's memorandum of law provided in full in the Appendix demonstrates that it relied upon an Eleventh Amendment argument to oppose Feaster's ADA complaint. FBN's statements to the contrary in the Brief in Opposition are inaccurate and untrue.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ELIZABETH FEASTER,

Plaintiff,

vs. CASE NO. 01-07361 CA

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Defendant.

_____/

THE BOARD' S MOTION TO DISMISS

Pursuant to Florida Rule of Civil Procedure 1.140(b) (2) and 1.140(b) (6), the State of Florida, Department of Health, Board of Nursing (the "Board") moves to dismiss the Complaint filed by Elizabeth Feaster ("Feaster") and says:

1. This Court does not have personal jurisdiction over the Board because the Board is immune from suit for damages under Title II of the Americans With Disabilities Act (the "ADA").

2. This Court does not have personal jurisdiction over the Board because the Board is immune from suit for injunctive relief under Title II of the ADA.

3. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because she is not an otherwise qualified individual with a disability.

4. Alternatively, Feaster fails to state a cause of action under Title II of .the ADA because, as a matter of law, the Board's actions are lawful under the necessity exception to the ADA.

5. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because, as a matter of law, the Board's actions are lawful under the direct threat exception to the ADA.

6. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because, as a matter of law, the .Board's actions are lawful under the ADA.

WHEREFORE, the Board respectfully requests that this Court enter an Order dismissing Feaster's Complaint with prejudice.

Respectfully Submitted,

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34747, this 3d day of December, 2001.

LESLEI G. STREET

cc: Edward Tellechea-

**APPENDIX B**

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ELIZABETH FEASTER,

Plaintiff,

vs. CASE NO. 01-07361 CA

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Defendant.

_____/

THE BOARD'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

The State of Florida, Department of Health, Board of Nursing (the "Board"), moves to dismiss the Complaint filed by Elizabeth Feaster ("Feaster") for lack of jurisdiction and failure to state a cause of action. The Court does not have jurisdiction over the Board because it is immune from suit for damages under Title II of the Americans With Disabilities Act and because the Court can not issue an injunction against the Board. Feaster's Complaint does not state a cause of action because. she is not an otherwise qualified individual with a disability, because the Board's actions fall within a statutory exception, or because the Board's actions are otherwise lawful. The legal bases for these reasons are set out below.

I. THIS COURT LACKS JURISDICTION

A State is immune from suit unless its immunity has been properly waived. In this case, because the State's immunity from suit for damages under the ADA has not been waived, and because the Board is a state entity, it can not be sued under the ADA. This result is the same whether the suit is brought in state court or in federal court. In addition, this Court can not enjoin the Board. Only a public official in his or her official capacity can be enjoined from taking actionin violation of a federal statute such as the ADA.

A. AS A STATE ENTITY, THE BOARD IS IMMUNE FROM SUIT FOR DAMAGES UNDER THE AMERICANS WITH DISABILITIES ACT

The Eleventh Amendment to the United States Constitution provides that the federal power can only be wielded against states in limited circumstances.

To be subjected to federal civil rights legislation in federal or state court, the State's Eleventh Amendment and sovereign immunity must both be waived. The Eleventh Amendment immunity can only be waived by Congress enacting appropriate legislation under Section 5 of the 14th Amendment.

The United States Supreme Court ruled in Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955, 531 U.S. 356, 148 L.Ed.2d 866 (2001), that Congress did not properly abrogate the states' Eleventh Amendment immunity when it enacted Title I of the Americans With Disabilities Act. Title I of the ADA is not appropriate enforcement legislation, the Court ruled, because Congress exceeded its constitutional authority under the 14tk~ Amendment. Garrett, 531 U.S. at 360. Congress exceeded its

authority by proscribing certain state action as unlawful discrimination and making the states amenable to private suits for damages without first making record findings that states had historically and irrationally discriminated against the disabled. Id. at 357-58.

Moreover, the State of Florida can not be sued under Title I of the ADA for damages in state court. Alden v. Maine, 119 S. Ct. 2240, 527 U.S. 706, 144 L. Ed. 2d (1999). This immunity from suit in state court rests on the state's historic immunity from suit, which is extant until and unless it has been properly abrogated through Congressional action against the Eleventh Amendment or properly waived through the State's own waiver of its Eleventh Amendment immunity and its sovereign immunity. Id. at The State of Florida has not waived its Eleventh Amendment immunity, nor has it waived its sovereign immunity from suit under federal claims. See Fla. Stat. § 111.071(4), 768.28 (1), (17). As the United States Supreme Court explained in Alden v. Maine, if Congress has not abrogated the state's Eleventh Amendment immunity through federal legislation, and the state has not waived its Eleventh Amendment immunity or its sovereign immunity as to any particular federal claim, then the State can not be sued in any court on that federal claim.

Feaster's claim under Title II is subject to the same legal analysis. Congress passed Title II at the same time and with the same factual findings as Title I. Because Congress failed to identify a history and pattern of irrational discrimination as to Title I of the ADA, it likewise must have failed to identify a history and pattern of irrational discrimination as to Title II of the ADA. See Garcia v. S.U.N.Y. Health Sciences Center, 2001 WL 1159970 (2d Cir. Sept. 26, 2001); Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001); see also Attachment 1 (Association for Disabled Americans, Inc. v. Florida International Univ., 2001 WL

1669423 (S.D. Fla. Dec. 12, 2001) (holding that the State of Florida is immune from suit for damages under Title II of the ADA)).

Moreover, because the State of Florida has not waived its Eleventh Amendment immunity or its sovereign immunity from suit under Title II of the ADA, Feaster can not sue the State of Florida for damages under Title II of the ADA. Feaster's claim must therefore be dismissed with prejudice.

B. THE BOARD CAN NOT BE ENJOINED FROM VIOLATING THE ADA

Injunctive relief is only available against an individual public official acting ultra vires in his or her official capacity. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). No public official is named in Feaster's suit, and the Board can not be enjoined.

II. FEASTER FAILS TO STATE A CAUSE OF ACTION UNDER THE ADA

A. FEASTER IS NOT AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY

Feaster has not passed the test and until she does her claims are moot.

Assuming she does, she is still not ipso facto an otherwise qualified individual with a disability. First, the Board does not know whether she is disabled within the meaning of Title II of the ADA. It seeks information in order to make that determination. Second, even if Feaster does have a disability within the meaning of the ADA, she can only be otherwise qualified if, with or without reasonable

accommodations, she can meet the licensing requirements. The licensing requirements include the ability to practice with the necessary skill and safety. Again the Board can not know whether Feaster can practice with the necessary skill and safety until it has received a doctor's expert opinion on that matter, including an opinion on what, if any, accommodations may be necessary.

### B. THE BOARD'S LICENSING DECISIONS ARE EXEMPT FROM THE ADA BECAUSE THE BOARD'S DECISIONS SAFEGUARD PUBLIC SAFETY

Title II of the ADA prohibits a public entity from discriminating, excluding or denying a qualified individual with a disability participation in or the benefits of the services, programs, or activities of that public entity on the basis of that individual's disability. 42 U.S.C. § 12132. A state's duty to regulate licensure of physicians is not a service, program, or activity provided by a state within the meaning of the ADA. As the court stated in Alexander v. Margolis, 921 F. Supp. 482, 488 (W.D. Mich. 1995), aff'd, 98 F.3d 1341 (6th Cir. 1996) "The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual, who does not meet the state's requirements for practicing medicine." Even if Title II of the ADA does apply to a state's licensing decisions, those decisions are made pursuant to the state's fundamental mission to protect the Cafety of the public and are therefore within the necessity exception to the ADA.

#### 1. LICENSING IS EXEMPT UNDER THE BUSINESS NECESSITY EXCEPTION

The Board's referral to IPN is not a violation of Title

II of the ADA because it is a business necessity. Equal Employment Opportunity Commission v. Exxon, 203 F.3d 871 (5th Cir. 2000).

### 2. LICENSING IS EXEMPT UNDER THE DIRECT THREAT EXCEPTION

The Board's referral to IPN is not a violation of Title II of the ADA because it falls within the direct threat exception. That is, if Feaster has one or more mental or physical conditions that preclude her from practicing nursing with skill and safety, and the Board is precluded from finding out about it, then Feaster is a direct threat to the public safety. See, EEOC v. Exxon, supra.

The Florida Board of Nursing is charged with the responsibility of preserving in the practice of nursing the health, safety, and welfare of. the public under the police powers of the State. Fla. Stat. § 455.201; 458.307, .309, .311, .331. This grave responsibility encompasses ensuring that no nurse in the State is "unable to practice medicine with reasonable skill and safety to patients . . . as a result of any mental or physical condition." Fla. Stat. § 458.331(1) (s). Thus, it is the Board's fundamental duty to ensure that Feaster's mental or physical conditions would not preclude her from practicing medicine with reasonable safety to patients.

This duty falls squarely within the necessity exception to Title II of the ADA. That exception, put forth in the implementing regulations, provides:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability from fully and

> equally enjoying any service, program, or activity, unless such Feaster v. Board of Nursing criteria can be shown to be necessary for the provision of that service, program, or activity being offered.

28 C.F.R. § 35.130(b) (8). Thus, a state may use eligibility criteria that screen out or tend to screen out individuals with disabilities if the criteria are necessary to ensure the health or safety of others. 28 C.F.R. Pt. 35, app. A.

This necessity exception is applicable to state licensing and application processes for positions in which the licensee or position may pose a direct threat to the health and safety of the public. E.g., Doe v. Judicial Nominating Comm' n, 906 F. Supp. 1534, 1541 (S.D. Fla. 1995) (citing cases) . A state licensing board has the responsibility and the right to thoroughly inquire into an applicant's mental and physical conditions, including inquiring into an applicant's diagnosis or treatment for mental conditions. Doe, 906 F. Supp. at 1542. In this case, the Board sought specific information from Feaster regarding her diagnosis and treatment for a condition that might be a disability with the meaning of the ADA. The Board's narrowly tailored approach is designed to help the Board understand Feaster's current performance and to ensure the Board that Feaster would not in the future pose a threat to the safety of her patients.

As the court said in Alexander, addressing the plaintiff's claim that the board of medicine improperly refused to reinstate his medical license, "the Board can not exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to.practice

with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion." Alexander, 921 F. Supp. at 488. So too, in this case, the Florida Board of Medicine nursing, and must have, the duty and the right to thoroughly inquire into Feaster's ability to safely practice in Florida.

Respectfully Submitted,

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JOSEPH BRENNAN DONELLY

**APPENDIX C**

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ELIZABETH FEASTER,
*Appellant,*

vs. CASE NO. 1D02-1631

STATE OF FLORIDA, DEPARTMENT
OF HEALTH, BOARD OF NURSING,
*Appellee.*
_____/

On Appeal from the Fourth Judicial Circuit
In and For Duval County, Florida

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**WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMONITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS**

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Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190 (2001)

Doe v. Div. of Youth & Family Services, 148 F Supp. 2d 462 (D.N.J. 2001)

Fedorov v. Board of Regents for the University of Georgia, 194 F.Supp.2d 1378 (S.D.Ga. 2002)

Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001)

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Navedo v. Maloney, 172 F.Supp 2d 276, 288 (D.Mass. 2001)

Neiberger v. Hawkins, 150 F.Supp. 2d 1118 (D.C.Col. 2001)

Pennhurst State School & Hospital V. Halderman,
465 U.S. 89 (1984)

Popovich v. Cuyahoga County Court,

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Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001)

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001)

Response Oncology, Inc. v. Metrahealth Insurance Co., 978 F.Supp. 1052 (S.D.Fla. 1997)

Thompson v. Colorado, 258 F.3d 1241 *amended,* 278 F.3d (10th Cir. 2001), *cert. denied,* 122 S. Ct. 1960 (2002)

U.S. V. Gallo, 195 F.3d 1278 (11th Cir. 1999) .

Williamson v. Georgia Dept of Human Resources, 150 F. Supp. 2d 1375 (S.D. Ga. 2001)

**State Cases**

Andrews v. Florida Parole Com'n., 768 So. 2d 1257 (Fla. 1st DCA 2000), *rev. dism. as improv. granted,* 791 So. 2d 1093 (Fla. 2001)

Kionis v. State, Department of Revenue,

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Mobil Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977)

State v. Dwyer, 332 So. 2d 333 (Fla. 1976)

Titus v. State, 696 So. 2d 1257 (Fla. 4th DCA 1997), *approved with opinion* 707 So.2d 706 (Fla. 1998)

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28 C.F.R. §35.130(6) & (8)

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*passim passim*

## STATEMENT OF THE CASE AND FACTS

Feaster appeals from the dismissal, with prejudice, of her complaint against the Department of Health, Board of Nursing (Board), brought under Title II of the Americans with Disabilities Act (ADA). Her complaint included two counts. The first sought injunctive relief that the Board cease discriminating against her in violation of 42 U.S.C. §12132 and 28 CFR §35.130(6) & (8) . The second sought damages resulting from the Board's violation of her rights "under Title II of the ADA" and attorney's fees. (R:6, ¶36 & 37)

The Board moved to dismiss (R:10-11), primarily on the ground that Title II of the ADA did not properly abrogate the states' sovereign immunity. (R:14-17). By order rendered March 15, 2002, the court granted the Board's motion (R:24-6), agreeing that Feaster's claim was so barred. Feaster filed her notice of appeal on April 12, 2002.

On June 10, this Court relinquished jurisdiction to the trial court, so that Feaster could obtain and file a final order. In response, the trial court issued another order (dated June 28) dismissing Feaster's "cause" with prejudice. Feaster filed the order, in this Court, on or about July 26.

Feaster's complaint alleged she was disabled as a result of a 1998 closed head injury, which impaired her ability to perform "tasks that measure attention such as examinations." (R:2, ¶6) •1 Nevertheless, after graduating from the nursing program at Daytona Beach Community College, she took the nursing license examination at a learning center in Jacksonville. The exam was given in a room with a dozen other people taking exams, and others being tested on computers. In this allegedly "noisy and distracting" environment, Feaster failed the exam. (R:2, ¶118-14).

She then requested, with corroborating letters, that the Board accommodate her by providing a private room to

take the exam, with a 10-minute break each hour. (R:3, ¶1115 & 17). The Board declined to do so, and directed Feaster to be independently evaluated by the Intervention Project for Nurses (IPN) to determine whether she could practice as a registered nurse with reasonable skill and safety. (R:3-4, ¶1121-23). Although not specifically alleged, Feaster did not obtain a nursing license because she failed the licensing exam.[2]

'The one-volume record will be cited as (R: [page no.]).

[2]The Board does not accept several conclusory observations in Feaster's complaint. There, she declares the IPN program "groups drug and alcohol abusers with those having physical or mental impairments [;]" and, consequently, she has been stigmatized as a impaired practitioner. (R:4,111127-8). Such observations are not facts, but conclusory statements. They are speculative and call for unwarranted deductions, and must be rejected. *See* W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So.2d 297, 300 (Fla. 1st DCA 1999), *citing* Response Oncology, Inc. v. Metrahealth Insurance Co., 978 F.Supp. 1052, 1058 (S.D.Fla. 1997), for the proposition that appellate courts "need not accept ... conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.

## SUMMARY OF THE ARGUMENT

Feaster sued the Board for damages and injunctive relief under Title II of the Americans with Disabilities Act. Title II, however, does not properly abrogate state sovereign immunity from suit under federal law in federal court). *See* Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (broadly holding Title I does not validly abrogate the Eleventh Amendment). Consequently, suit

cannot be brought under Title II against the Board in state court. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding Congress cannot, pursuant to Article I of het Constitution, abrogate state sovereign immunity from suit for damages in state court).

The great number of state and federal courts which have reached the issue since Garrett, have held that Title II does not validly abrogate the Eleventh Amendment. The Garrett decision, while expressly limiting its holding to Title I, said nothing to indicate the result would be different as to Title II. This Court should follow the great majority of courts and hold Title II does not validly abrogate the Eleventh Amendment.

Without distinguishing between Titles I and II, the Eleventh Circuit held the ADA did properly abrogate the Eleventh Amendment in Kimel v. State Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998). Kimel is no longer good law in light of Garrett, and the fact all federal circuits ruling on the issue since have found Title II does not properly abrogate. Because this Court is not bound by lower federal court decisions, it should disregard Kimel, follow the other federal circuits, and affirm the order under review.

## ARGUMENT

## ISSUE

**WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMUNITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS.**

### A. Title II of the ADA Does Not Properly

## Abrogate the Eleventh Amendment

Feaster sued the Board under Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. §12131 et *seq.* Correctly relying on Garret, the trial court dismissed her complaint with prejudice. That order is reviewed de novo. Andrews v. Florida Parole Com'n., 768 So.2d 1257, 1260 (Fla. 1st DCA 2000), *rev. dism. as improvidently granted,* 791 So.2d 1093 (Fla. 2001).

Florida has not consented to suit under Title II, or waived its immunity from suit under federal law. The broadest waiver[3] of sovereign immunity is found in §768.28, Florida Statutes, but that statute waives immunity only for torts, and only "to the extent specified in this act." *See* §768.28(1). *Cf.* §768.28(17), Florida Statutes (2001) (expressly declaring no provision of the Florida Statutes "shall be construed to waive the immunity of the state or any of its agencies from suit in federal court"). Therefore, Feaster's suit can proceed only if Title II properly abrogates state sovereign immunity from suit under federal law, and thereby overcomes Florida's sovereign immunity from suit in its own courts. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (observing, in a suit based on state law brought in federal court, that "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment").

[3]Ch. 760, Fla. Stat., is a state-level civil rights act which operates to waive sovereign immunity when a state-law discrimination claim is brought against a governmental

entity. Kionis v. State, Dent. of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000). It does not recognize any federal cause of action, and does not create a cause of action for claims such as those brought by Feaster.

Literally, Title II purports to abrogate the Eleventh Amendment. *See* 42 U.S.C. §12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). Nevertheless, such abrogation is not effective.

Garrett held Title I of the ADA, which imposes affirmative obligations upon employers, does not validly enforce §5 of the Fourteenth Amendment,[4] and therefore does not abrogate state sovereign immunity in federal court. The Court observed that the Fourteenth Amendment does not require the states, as employers, to make special accommodations for the disabled. If such accommodations are to be required they must come from positive law and not through the Equal Protection Clause. 531 U.S. at 368. Further, valid §5 legislation must be based on a pattern of discrimination by the states in violation of the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Garrett then held Title I satisfied neither of these requirements.

Title II fails as §5 enforcement legislation for the same reasons. Nothing in the legislative history of the ADA, found insufficient to sustain abrogation by Title I, would be sufficient to sustain abrogation by Title II. Six federal circuits, five after Garrett, have so held.[5] *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc) (extension of Title II to states was not a valid exercise of Congress' Fourteenth Amendment enforcement powers); Thompson v. Colorado, 258 F.3d 1241, *amended,* 278 F. 3d

1020 (10th Cir. 2001), *cert. denied,* 122 S.Ct. 1960 (2002); Rickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001); Randolph v. Rodgers, 253 F.3d 342, 345 n.4 (8th Cir. 2001); Popovich v. Cuyahoga County Court, 276 F.3d 808 (6th Cir. 2002) (en banc), *pet. for cert. pending* (case no. 01-1503). *See also* Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001) (federal regulation which prohibited states from charging any fee for handicapped parking placards failed, as it was based on statute (Title II) that did not properly abrogate Eleventh Amendment).

[4]Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[5]Only the Ninth Circuit has sustained a Title II action against a state entity *See* Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002). The Hason panel, however, simply relied on Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190 (2001); and concluded that since Garrett was a Title I decision it had no reason to reconsider Dare. *See* 279 F.3d at 1170.

Garcia would allow a damages claim only on proof of discriminatory animus. 280 F.3d at 111-112. Without conceding that much of Garcia is correct, the Board notes Feaster does not allege discriminatory animus. Instead, she was treated the same as non-disabled test takers; that is, she was tested under the same conditions as non-disabled persons, and later denied better treatment through special accommodation.

Feaster then alleges discrimination based on the Board's decision to require an evaluation by the IPN program, which protects the public's safety by determining

whether impaired persons can practice their profession with reasonable skill and safety. This type of discrimination is completely reasonable to ensure patients are not harmed through well-intentioned but injurious acts by impaired nurses.[6] Garrett expressly condones such:

> States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could ... hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

*Id.*, 531 U.S. at 367.

Popovich held that the ADA cannot be sustained as an act that enforces the Equal Protection Clause, but may be read to enforce the Due Process Clause. 276 F.3d at 812, 813. Not conceding Popovich is correct on this point, the Board simply notes Feaster has not claimed a violation of due process.

The common thread running through these cases is that the equal protection clause prohibits only that treatment of the disabled which is not rational. Title II's demand that states undertake affirmative obligations, including provision of "private" rooms to take professional licensing exams, far exceeds what the Constitution requires.

[6]As an alternative ground to sustain the order below, this Court could hold that regulation of the nursing profession- -here, to ascertain the ability of impaired nurses to competently practice-is not a service, etc. covered by the ADA. *See* Alexander v. Margolis, 921 F.Supp. 482, 488

(W.D.Mich. 1995) (questioning whether the duty of state board to license physicians was a "service" under the ADA, and holding that mentally ill doctor was not a "qualified individual with a disability" under the ADA).

These cases agree that Congress did not identify a history and pattern of unconstitutional discrimination by the states against the disabled. Thompson, 258 F.3d at 1254; Brown, 166 F.3d at 707: Reickenbacker, 274 F.3d at 982; Alsbrook, 184 F.3d at 1009-1010. Lacking this foundation, Title II cannot be considered preventive or remedial legislation, and cannot be congruent and proportional to any constitutional violation.

Because Congress did not properly abrogate the Eleventh Amendment in Title II, that law also is not a valid abrogation of state sovereign immunity from suit under federal law in state court. Therefore, the Board cannot be required to accommodate Feaster, and she cannot obtain injunctive relief, damages or fees.

B. Response to Feaster's Points

Feaster advances three related points: (A) the Eleventh Circuit's decision in Kimel upheld Title II against an Eleventh Amendment challenge; (B) that Garrett does not overrule Kimel and (C) Kimel is binding precedent on this Court. All three points are wrong. The Board will respond to them as one.

Kimel was decided 2 to 3 years before Garret. More important, the Eleventh Circuit has not addressed the issue of abrogation by Title II since Garret. As noted earlier in this brief, every circuit which has reached the issue after Garrett has found Title II not to be a valid abrogation of the Eleventh Amendment.

Also, Kimel's rationale is broad, referring to the "ADA" without once distinguishing between Title I and Title II. No facts are recited, so it cannot be discerned which title was at issue. Therefore, if not overruled by Garrett, it has no persuasiveness in light of all other post-Garrett federal circuit decision to the contrary.

Feaster relies on Navedo v. Maloney, 172 F.Supp 2d 276, 288 (D.Mass. 2001) for the proposition that Kimel upheld Title II. (initial brief, p.6). The Navedo court simply read too much into Kimel.

More significant, at least two district courts within the Eleventh Circuit's jurisdiction have recently ruled to the contrary. *See* Association for Disabled Americans v. Florida International University, 178 F.Supp.2d 1291, 1294 (S.D. Fla. 2001) (finding that "Congress did not identify a history and practice of irrational discrimination by the states" when enacting Title II, and that the Eleventh Amendment bars suit against a nonconsenting state under that law) [hereinafter FIU]. Were Kimel controlling, FIU could not have concluded Title II failed to abrogate the Eleventh Amendment.[7] *See also* Fedorov v. Board of Regents for the University of Georgia, 194 F.Supp.2d 1378, 1386 (S.D.Ga. 2002) (concluding the Board "enjoys total immunity from Plaintiff's claims under (Title II of] the ADA").

[7]The issue is now before the Eleventh Circuit, as the FIU decision has been appealed (case no. 02-10360-J) and will be argued in January 2003.

Other federal district court decisions since Garrett have held the same. *See* e. g., Key v. Grayson, 163 F. Supp. 2d 697 (E.D.Mich. 2001); Jones v. Dep't of Public Welfare, 164 F.Supp. 2d 490 (E.D.Pa. 2001); Williamson v. Georgia Dep't of Human Resources, 150 F.Supp.2d 1375 (S.D.Ga. 2001); Lieberman v. Delaware, 2001 WL 1000936 (D.Del. Aug. 30,

2001); BadilloSantiago v. Andreu-Garcia, 167 F. Supp. 2d 194 (D.P.R. 2001); Neiberger v. Hawkins, 150 F.Supp. 2d 1118 (D.C. Col. 2001); Doe v. Div. of Youth & Family Servs., 148 F. Supp. 2d 462 (D.N.J. 2001)

Although Garrett invalidated Title I only, it said nothing to indicate a different result would be reached as to Title II. The most which can be said is that the U.S. Supreme Court simply has not yet decided whether Title II validly abrogates the Eleventh Amendment.

Feaster concludes by urging that Kimel, as an Eleventh Circuit decision, is binding precedent on Florida courts. (initial brief, p.9-14). The first case she cites, Mobil Oil Corp. v. Shevin 354 So.2d 372 (Fla. 1977), is a prominent case on collateral estoppel. It has no bearing on this case, as the parties in Kimel were not identical to the parties here. *See* Mobil Oil, 354 So.2d at 374 (noting the "essential elements of the doctrine are that the parties and issues be identical ....").

As an Eleventh Circuit decision, Kimel is not binding on this Court, as "lower" federal court rulings are not binding on state courts. State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976); Titus v. State, 696 So.2d 1257, 1263 (Fla. 4th DCA 1997) ("Moreover, a Florida District Court of Appeal takes its direction on matters of federal constitutional law first from the United States Supreme Court and, in the absence of definitive precedent from that Court, from the Florida Supreme Court."), *approved with opinion* 707 So. 2d 706 (Fla. 1998)

Feaster also ignores the obvious. The Garrett decision, issued after Kimel, changed the law. It broadly held Title I of the ADA did not properly abrogate the Eleventh Amendment, and gave no indication the result would be different had the Court chosen to address Title II. This change in the law eliminated whatever persuasiveness

remained in Kimel.

In light of Garrett, and the fact all other federal circuits ruling afterward have reached the opposite conclusion, Kimel has been completely undermined and is not binding even in the Eleventh Circuit itself.[8] *See* U.S. v. Gallo, 195 F.3d 1278, 1284 (11th Cir. 1999) ("As a rule, our prior precedent is no longer binding once it has been substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent." (e.s.]); Lufkin v. McCallum, 956 F.2d 1104, 1107 (11th Cir.) ("A panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court of the United States."), *cert. den.* 506 U.S. 917 (1992). It would be absurd to consider Kimel binding here.

8 Feaster's statement to the contrary (initial brief, p.13) is wrong. Under her logic, no U.S. Supreme Court case would supercede an earlier Eleventh Circuit decision, unless the Eleventh Circuit's decision itself were reversed.

Feaster then advances several decisions in which the Eleventh Circuit discusses the importance of adhering to its precedent until overruled en banc or by the U.S. Supreme Court. (initial brief, p.11-14). These cases are simply inapposite. The Board is not asking this Court to disregard its own precedent, or that of the Florida or U.S. Supreme Court. Instead, it is asking this court to follow Garrett's logic, disregard Kimel's badly undermined holding as to Title II, and reach the same result as every federal circuit that has re-visited issue since Garrett: Title II does not validly abrogate the Eleventh Amendment.

## CONCLUSION

The June 28, 2002 order dismissing Faster's complaint must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a true copy of this answer brief has been sent by U.S. Mail to Appellant's counsel, JIMMY CHARLES, 215 Celebration Place, Suite 500, Celebration, Florida 34747; this 4th day of October, 2002.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I certify Courier New 12-point, non-proportionately spaced type is used in this brief, in accord with Fla.R.App.P. 9.210 (a) (2).

Charlie McCoy
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